No 82-285

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In The

Supreme Court of the United States

October Term, 1982

ROBERT WYLER, DIANNE BECKER, JASPER ALEXANDER BANKS & BONNA L. QUIGLEY HOLMES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANK A. LOPEZ
MEYER, LIGHT, LONDON
& LOPEZ
188 Montague Street
Brooklyn, New York 11201
(212) 834-8888

MICHAEL P. JOSEPH
JOSEPH & STALONAS
225 Broadway
New York, New York 10007
(212) 962-4466

Attorneys for Petitioners

6606 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 542-1114

QUESTIONS PRESENTED

1. Whether the District Court erred in refusing to grant a severance in order to allow petitioners Wyler and Becker to utilize the exculpatory testimony of a co-defendant who refused to testify unless a severance was granted.

2. Whether the District Court erred in refusing to grant petitioner banks a severance on the basis that his defense was inconsistent with the defense of his co-defendant.

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The petitioners Robert Wyler, Dianne Becker, Jasper Alexander Banks and Bonna L. Quigley Holmes respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit affirming the judgment of conviction entered against the petitioners by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the Court of Appeals was not recorded. Said opinion appears in the Appendix hereto at page 1a. No opinion was rendered by the District Court for the Southern District of New York.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was rendered and entered on June 14, 1982. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. Rule 14 of the Federal Rules of Criminal Procedure which provides as follows:

"RELIEF FROM PREJUDICIAL JOINDER

'If it appears that a defendant or the Government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trials of counts, grant the severance of defendant or provide what other relief justice requires. In ruling on a motion by a defendant for severance the Court may order the attorney for the Government to deliver to the court for inspection in camera any statement or confession made by the defendants which the Government intends to introduce in evidence at the trial.' "

2. The Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On April 8, 1981, Indictment SSS 81 Cr. 0054 was filed in twelve counts, charging the four petitioners with various crimes arising out of the attempt to effect the escape of Wyler from the Metropolitan Correctional Center located in the Southern District of New York by means of a helicopter. Counts One through Four and Seven through Ten charged each of the four defendants with conspiracy to commit, in violation of Title 18, United States Code, Section 371, and the commission of, the following offenses: aircraft piracy, in violation of Title 49, United States Code, Section 1472(i)(1)(A) and (i)(2) and Title 18, United States Code, Section 2; interference with a flight crew member by means of a deadly and dangerous weapon, in violation of Title 49, United States Code, Section 1472(j) and Title 18, United States Code, Section 2; kidnapping, in violation of Title 18, United States Code, Sections 1201(a)(3) and 2; assault on a federal corrections officer by use of a deadly and dangerous weapon, in violation of Title 18, United States Code, Sections 111 and 2; unlawful use of a firearm, in violation of Title 18, United States Code, Sections 924(c) and 2, receipt or possession of an unregistered firearm, in violation of Title 26, United States Code, Sections 5841, 5845(a), 5861(d) and 5871 and Title 18, United States Code, Section 2, and transporting, shipping or receiving in interstate commerce a firearm which had the manufacturer's serial number obliterated, in violation of Title 18, United States Code, Sections 922(k) and 925(a) and 2.

Count Five charged Wyler alone with attempting to escape from the M.C.C., in violation of Title 18, United States Code, Sections 751(a) and 2. Count Six charged the other three defendants with aiding and assisting Wyler's attempted escape,

in violation of Title 18, United States Code, Sections 752(a) and 2. Count Eleven charged Wyler, and Count Twelve charged Banks, with receiving, while being a convicted felon, a firearm that had been shipped or transported in interstate commerce, in violation of Title 18, United States Code, Sections 922(h) and 924(a) and 2.

Prior to the commencement of the trial, Wyler and Becker moved for a severance based upon the need to call co-defendant Holmes in order to establish their defense. In support of their application, both Wyler and Becker submitted affidavits from Holmes. In the affidavits sworn to on the 28th day of April, 1981 (*see* Appendix 9a, 11a) Holmes stated that at a joint trial she would refuse to waive her Fifth Amendment right and decline to testify. However, Holmes stated further that at a separate trial for Becker and Wyler she would testify and waive her Fifth Amendment privilege. These affidavits indicated that Holmes' testimony would be exculpatory in that it would prove that Wyler and Becker were not guilty of air piracy, kidnapping, nor interfering with a flight crew member. The affidavit stated that the plan was to attempt the escape only if the helicopter pilot could be bribed into voluntarily cooperating in the escape plan. Thus, there was no conspiracy to commit the crimes of air piracy, kidnapping, nor interfering with a flight crew member. Holmes' affidavit also stated that on January 25, 1981, Becker explicitly told Holmes that she no longer wanted to participate in the planned escape attempt and was opposed to any further steps being taken by anyone to carry it out.

During the argument on the severance motion, Judge Robert Ward presiding in the District Court for the Southern District of New York expressed a concern that the Holmes' affidavit did not establish that her position was that she would testify immediately after trial regardless of her right to appeal. Ms. Holmes thereafter did in fact provide the trial court with such assurance. In an affidavit sworn to on the 13th day of July, 1981,

Holmes' states that after her own trial was concluded she would waive her Fifth Amendment right and testify at the trial of Wyler and Becker even if she had been convicted and Wyler and Becker's trials were conducted before her direct appeal had been completed (13a).

The District Court denied the application for severance as to Wyler and Becker.

The trial commenced on August 17, 1981. In their opening statements, counsel for Wyler, Becker and Holmes indicated either explicitly or implicitly that their clients were involved in arranging an escape, though denying any force, hijacking or kidnapping. Counsel for Banks contended that Banks was in no way a part of the plan to attempt to effectuate Wyler's escape. After these opening statements, Banks moved to sever on the grounds that his defense was inconsistent with the defense of his co-defendant. Said motion was denied by the District Court. On several occasions during the course of trial Banks renewed his motion for severance based upon the grounds that his defense was inconsistent with the defense of his co-defendants. On each occasion the trial court denied the application.

During the course of the trial the Government called two witnesses who were helicopter pilots who testified that they had been offered a large sum of money to fly a mission which they knew was illegal and did in fact fly several practice missions with petitioner Holmes. Each of these pilots stated that the plan had been for them to tell the authorities that they had been hijacked so as to cover their participation in the escape plan. Eventually each of the pilots decided not to take part in the illegal mission.

The Government called as a witness a pilot named Nietsche who testified that he was forced at gunpoint to land on the roof of the Metropolitan Correctional Center. Counsel for Wyler,

Becker and Holmes contended both in their cross-examinations and in their summations that the pilot was in fact a willing participant and was not being truthful in his testimony before the Court. In fact, the sole argument put forth by Wyler, Becker and Holmes was that their was no air piracy, kidnapping nor interfering with flight crew members.

The trial concluded on September 25, 1981. On said date, the jury returned a verdict of guilty as to each defendant on each count on which he was named. Robert Wyler received an aggregate sentence of 30 years. Dianne Becker, Bonna L. Quigley Holmes and Jasper A. Banks each received an aggregate sentence of 20 years.

The United States Court of Appeals for the Second Circuit affirmed the conviction of each of the petitioners.

EXISTENCE OF JURISDICTION BELOW

As stated above, petitioners were indicted and convicted in the District Court for the Southern District of New York of offenses in violation of United States Code.

The Court of Appeals for the Second Circuit has decided a federal question in a way that is in conflict with the applicable decisions of the court and with the decisions of courts of other circuits.

REASONS FOR GRANTING THE WRIT

I.

Wyler and Becker were denied a fair trial by the failure to grant a severance so as to allow them to utilize the exculpatory testimony of a co-defendant who refused to testify unless a severance was granted.

The denial of a severance motion requires a reversal of a conviction when there has been an abuse of discretion by the trial court and when said abuse results in substantial prejudice to the defendant. *United States v. Taylor*, 562 F. 2d 1345 (2d Cir. 1977), *cert. denied*, 432 U.S. 909, 97 S. Ct. 2958, 53 L. Ed. 2d 1083 (1977); *United States v. Shuford*, 454 F. 2d 772 (4th Cir. 1971). The facts of this case are such as to cause the denial of the severance motions to constitute an abuse of discretion by the trial court requiring a reversal of the conviction.

The factors that shall be considered by the trial court in determining an application for a severance have been specifically set forth in the Second Circuit. *United States v. Finklestein*, 526 F. 2d 517 (2d Cir. 1975), *cert. denied*, 425 U.S. 960, 96 S. Ct. 1742, 48 L. Ed. 2d 205 (1976). *Finklestein* provides the following guidelines to be considered by the trial court in determining a motion for severance:

> 1. The sufficiency of the showing that the co-defendant would testify at a severed trial and thereby waive his or her Fifth Amendment privileges;
>
> 2. The degree to which the exculpatory testimony would be cumulative;

3. Judicial economy;

4. The likelihood that the testimony would be subject to substantial damaging impeachment.

Holmes' affidavit sufficiently established that she would testify on behalf of Wyler and Becker at a severed trial. Said affidavit states in part that "If . . . Wyler's (Becker's) trial were severed, I would waive my Fifth Amendment right and testify in his behalf". This sworn statement clearly and unequivocally meets the test of the initial consideration in *Finklestein*. Further, in response to the trial court's expressed concern that the Holmes' affidavit did not establish that she would testify immediately after trial regardless of her right to appeal, Holmes submitted a supplementary affidavit. The supplementary affidavit stated that "I will waive my Fifth Amendment right and testify at the trial or trials of Wyler and Becker even if I am convicted and Wyler and Becker's trials are conducted before my direct appeal is completed". Holmes could do no more to establish she would testify than she did in her two affidavits. These affidavits establish as well that she would not testify if the severance were not granted. She states, "I do not intend to take the stand in my own defense or to waive my Fifth Amendment right against self-incrimination so long as the charges against me are pending", in that the severance was denied and Holmes did not testify.

The Holmes' affidavit also meets the second guidelines set forth in *Finklestein*. The second guideline has two aspects: The testimony of the co-defendant must in fact be exculpatory and secondly, it must not be cumulative.

Holmes' testimony was clearly exculpatory and necessary for Wyler's and Becker's defense. Wyler was charged not only with a conspiracy to effectuate his escape but also with air piracy, kidnapping and interference with a flight attendant.

The Holmes' affidavit establishes that her testimony would be exculpatory and essential for Wyler and Becker. Said affidavit states that

> "I would testify that although Mr. Wyler (Ms. Becker) and I had agreed to attempt to effectuate his escape by means of a helicopter from M.C.C. we had also agreed to do so only if the helicopter pilot could be bribed into cooperating with us in that escape. Mr. Wyler (Ms. Becker) never participated in any agreement and never indicated in any way that he (she) agreed to hijacking a helicopter in order to accomplish the escape."(10a, 12a).

This affidavit thus specifically sets forth the exact nature of said testimony as well as the way in which it would be exculpatory. The statement alone, if believed by a jury would have resulted in a not guilty verdict as to Counts Two, Three and Four in the indictment. This testimony was essential in that it formed the very basis of the defense put forth by counsel for Wyler and Becker. The trial testimony of the Government's own witnesses established that there was a sound basis for the argument being put forth by counsel, in that the Government called two witnesses who testified that they had in fact been offered money to fly the illegal mission. Each of these individuals, while eventually not taking part in the plan, did testify that they had been told to claim that they had been hijacked if questioned by the authorities.

Holmes was the only witness who could testify as to both the plans made with Wyler and Becker and as to what occurred in the helicopter on January 25, 1981. As well, Holmes was the one witness who could testify that Becker on January 25, 1981 stated that she no longer wanted to participate in the escape attempt and was opposed to any further steps being taken to carry

out said plan. Holmes' testimony therefore was not in any way cumulative and was highly exculpatory.

The third criteria requires a consideration of judicial economy. Though this is a serious consideration, it does not foreclose further inquiry into the issue of severance. *United States v. Finklestein, supra* at 524. The consideration of judicial economy is overcome if a joint trial would sacrifice the defendant's right to a fundamentally fair trial. In the case herein, the denial of the severance motion did make the trial fundamentally unfair.

The last consideration in the *Finklestein* guidelines is the likelihood that the testimony would be subject to substantial damaging impeachment. In fact, it is this factor alone that was relied upon by the Court of Appeals for the Second Circuit in affirming the denial of the severance motion. The Court of Appeals in its decision states that "The Government has already demonstrated its ability to impeach Holmes' testimony, since it successfully impeached the no hijacking theory at defendants joint trial." It is respectfully suggested that this statement is erroneous. It is true that the Government was able to overcome the no-hijacking theory at the joint trial. At said trial however, the defendants did not have the opportunity of putting forth Holmes' testimony. Without said testimony there was no direct evidence that could establish the defense theory put forth by counsel for Wyler and Becker. Had Holmes been allowed to testify there would have been testimony establishing that Wyler and Becker were not guilty of air piracy, kidnapping nor interference with a flight attendant. It then would have been for the jury to determine the weight to be given to this testimony.

The Court of Appeals in its decision also states that Holmes' testimony concerning Becker's withdrawal from the conspiracy could readily be impeached by Holmes' prior inconsistent statement that Becker was never in on the plan in the first place.

In fact, Holmes' affidavit clearly admits that Becker was in on the attempted escape plan. It states, however, that on January 25, Becker stated that she was withdrawing from said plan. Thus, Holmes' prior statement is not inconsistent with the defense that Becker withdrew from the escape plan.

In this case a severance was required in that Wyler and Becker's defense required the testimony of a co-defendant willing to testify if and only if a severance was granted.

The Court should grant a writ of certiorari to determine whether proper consideration was given to the various factors in deciding whether an abuse of discretion was committed by denying the severance motion of Wyler and Becker.

II.

The Court's refusal to grant Banks a severance denied him the right to a fair trial in that Banks' defense was inconsistent with the defense of his co-defendants.

In their opening statements, counsel for Wyler, Becker and Holmes indicated either explicitly or implicitly that their clients were involved in arranging an escape, though denying any force, hijacking or kidnapping. This position continued throughout the trial. Banks, in contrast denied any involvement with the attempted escape.

Following the opening statements of counsel, Banks made an application for a severance based upon the fact that Banks' defense would be irreconcilable with the defense of his co-defendant. Said application was denied. Banks renewed this motion for a severance on various occasions throughout the trial.

As a result of the denial of the severance Banks was denied the right to a fair trial. He was placed in a position where he suffered substantial prejudice as a result of being tried with his co-defendant. One aspect of this prejudice was in the area of in-court identification. Banks' co-defendants did not contest the identifications made by the Governme..t witnesses. In fact, on several occasions, counsel corraborated a witness' identification by conceding that his client was being referred to by said witness. The effect of this was to buttress the witness' credibility. By so doing, it became more difficult, if not impossible, for Banks to argue that he was improperly identified. *United States v. Johnson*, 478 F. 2d 1129 (5th Cir. 1973).

It should be noted when considering the issue of identification that an individual named Thomas McCreary was originally identified as having been the individual involved in the attempted escape as well as being the individual present in the helicopter on January 25, 1981. Pursuant to this identification McCreary was originally arrested and indicted. From this fact alone, it can be seen that Banks was prejudiced by being denied the right to properly raise the identification issue. Once the co-defendants asserted their defense, all the Government needed to do was to show that Banks had contact with the co-defendants to raise the inference that he was involved in the attempted escape.

Banks was prejudiced further as a result of the trial court's ruling throughout the trial that evidence was admissible as a result of Holmes, Wyler and Becker having opened the door by their stated theory of defense. Thus, Banks was prejudiced not only by the inevitable inferences that the jury would obviously make, but also by the testimony admitted against him which otherwise would not have been admitted into evidence.

The trial court should have granted Banks' severance at the outset of the trial. Not having done so, however, the Court had

a continuing duty to grant a severance as the prejudice from a joint trial became even more apparent. *Schaffer v. United States*, 362 U.S. 511, 805 S. Ct. 945 L. Ed. 2d 872 (1960). By denying Banks' severance, the Court denied him his right to a fair trial.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the judgment and opinions of the Court of Appeals for the Second Circuit.

Respectfully submitted,

FRANK A. LOPEZ
MEYER, LIGHT, LONDON
& LOPEZ

MICHAEL P. JOSEPH
JOSEPH & STALONAS

Attorneys for Petitioners